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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-975

ARTHUR MICHAEL NEWMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

ARTHUR MICHAEL NEWMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Arthur Michael Newman, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on October 26, 1972. Petition for rehearing *en banc* was denied on December 20, 1972 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the government established a prima facie case under 26 U.S.C. 7201, tax evasion, where there was no evidence of any affirmative conduct by petitioner, an essential element of the charge; and further, whether the conviction may stand upon the theory adopted by the Court of Appeals, that evidence of petitioner's allegedly false statements to Treasury agents constituted sufficient affirmative conduct to sustain the conviction, where he was not specifically charged with making false statements. This theory was never presented to the jury; accordingly, petitioner stands convicted of a charge other than that for which he was indicted, in violation of his substantive constitutional rights as defined in *Stirone* v. *United States,* 361 U.S. 212.

2. Whether the government made a prima facie case against petitioner, where evidence adduced by the government as part of its case in chief negated an essential element of the charge of tax evasion.

3. Whether petitioner's conviction may stand where the government failed to prove a likely source of taxable income for the prosecution years. *Cf. United States* v. *Massei,* 355 U.S. 595.

4. Whether application of the expenditures-net worth method of proof under the circumstances of this case, where petitioner maintained that his expenditures came from a

previously accumulated cash hoard from his prior career as a thief, violates petitioner's Fifth Amendment rights; further, whether the Fifth Circuit's approach to such method of proof involves the use of an unconstitutional presumption and impermissibly shifts the burden of proof to petitioner, in violation of due process of law as delineated in *Leary* v. *United States,* 395 U.S. 6, and in the trilogy: *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62, and *Haynes* v. *United States,* 390 U.S. 85.

5. Whether petitioner's right to a fair trial in accordance with due process of law was violated when the court permitted the jury to consider government's Exhibit 73, a prison admission summary, and testimony pertaining thereto, and denied petitioner's motions to strike or for a mistrial, since the document contained inadmissible and incompetent hearsay affective of petitioner's net worth at the beginning of the first indictment year.

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment V, provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Title 26, U. S. Code, Sec. 7201, provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Title 26, U. S. Code, Sec. 7203, provides in pertinent part:

> "Any person required under this title to pay any . . . tax, or required by this title or by regulations made under authority thereof to make a return . . . , who willfully fails to pay such . . . tax [or] make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

Statement of the Case

Petitioner, Arthur Michael Newman, was found guilty by a jury of having willfully and knowingly attempted to evade and defeat federal income tax for the tax years 1968, 1969, and 1970, a felony, in violation of 26 USC 7201, as charged in Counts 2, 3 and 4 of an 8-count indictment. He was acquitted of Count 1, charging the felony for 1967, and of Count 5, charging the misdemeanor (26 USC 7203) of failure to file a tax return for 1967. He was also convicted of Counts 6, 7, and 8, charging misdemeanors for 1968, 1969, and 1970; but the Court of Appeals vacated the convictions and sentences on the misdemeanor counts. (App. A, p. 9) Defendant faces concurrent 30 months sentences upon Counts 2, 3 and 4, as to which counts the Court of Appeals affirmed.

The government proceeded by way of the expenditures-net worth method of proof. It was stipulated that petitioner did not file income tax returns for the years 1967 through 1970. (A. 4)* A large number of documents were

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* Page references are to the Appendix to Defendant's Brief filed in the Court of Appeals for the Fifth Circuit, No. 72-1938.

admitted by stipulation, establishing expenditures by petitioner during the years in question which, if attributable to taxable income for those years, would account for the income alleged in the indictment. (A. 4) Petitioner did not stipulate to the source of the funds, but only to the admissibility of the documents showing the expenditures.

Lt. James V. Prigodich, of the Hollywood, Florida police department, testified for the government that in October, 1968, petitioner allegedly told him, while drinking at a bar, "I make $100,000 a year, tax free, without working." (A. 4-5) The witness made no written report at the time, and did not tell any IRS agent about petitioner's October 1968 comment until the summer of 1971. (A. 5)

Wayne LeTendre testified for the government that he was the personnel manager at the Reception and Medical Center at Lake Butler, Florida. He identified govt. exhibit 73 as petitioner's prison admission summary. The government sought to offer only those portions relative to petitioner's statement regarding his financial status and his assets upon being admitted to prison, and his date of discharge from prison. Over objections, the court permitted the government to read from govt. exhibit 73, page 2, par. 2 (A. 5) as follows: "Inmate's version of the offense — Subject states that even though he is innocent of this offense, he is financially unable to take further legal action in his own behalf," (A. 6) and from p. 7 of the exhibit as follows: "Personal assets. The inmate claims none. However, he expects that his parents will send him money while he is incarcerated." The witness testified that he prepared that portion of the record headed "personal assets" from information obtained through interview with petitioner. However, he did not prepare the portion regarding peti-

tioner's inability to continue legal action. The exhibit showed that petitioner was released upon expiration of his sentence on Oct. 20, 1966. (A. 6)

On cross-examination, LeTendre testified that the information contained in govt. exhibit 73 is "supposed to be" accurate. The witness only prepared certain portions of the document. The information in the portion on page 2 of the document, concerning petitioner's version of the offense, was not prepared by the witness initially, but was obtained from another unknown person or persons. Sometimes inmates interview new inmates. He was unaware that petitioner did in fact take further action by way of appeal. The material on pp. 6, 7 and 8 of the document was prepared by the witness, from a variety of sources. (A. 6) The document contained statements that petitioner's father was unknown (A. 6), that he was adopted by his step-father at age 4, and that he was born illegitimate and given the surname "Newman" when his mother married Samuel Newman. (A. 6-7) The document gives petitioner's birthdate as 6/12/38. The witness testified that inmates do not always give correct information when interviewed. Some inmates are "shy" about revealing their monetary status upon entry to the institution, and some do not always reveal their assets to the interviewer. (A. 7)

After further argument concerning the documents, the court denied petitioner's motion to strike the witness' testimony or for a mistrial. (A. 7)

Emmet T. Childress, Jr., a Special Agent for the I.R.S., Intelligence Division, developed evidence pertinent to expenditures made by petitioner, and attempted to determine whether the funds used for these expenditures came from taxable or nontaxable sources. He said all income is taxable, unless specifically excludable. Cash on hand at the

beginning of a tax period is non-taxable. Money from illegal activity earned during a tax period is taxable. As of January 1, 1967, he discovered petitioner owned a car. He conducted a four county search in the Miami area and utilized a "mail cover" to try to determine sources of nontaxable income, but discovered none. (A. 7)

He interviewed petitioner on November 9, 1970 in the presence of Agent Hilker and petitioner's attorney. (A. 7) Petitioner stated he had not filed tax returns during 1967 through 1969, that he knew the filing requirements, and that he had last filed prior to 1963. (A. 7-8) He said he was not employed during those years and did not have gross income of $600 or more in any one of those years. The witness told petitioner that all expenditures would be considered as taxable income unless from nontaxable sources. Petitioner told the witness that during 1966 through 1969, he received no gifts or inheritances, hadn't borrowed from any friends or relatives, and didn't loan anyone any money. Petitioner told him he did borrow money commercially respecting a car and a mortgage loan on his house. Childress testified that petitioner told him that all his expenditures were made from cash on hand which he had stolen as a professional thief prior to 1960, and that he retired after his release from prison in October 1966. Petitioner gave the witness information regarding bank accounts, and said all his deposits came from cash accumulated prior to 1960. Petitioner told the witness that cars and stocks were in his wife's name, that he (petitioner) had paid for them. Petitioner did not furnish the witness with any sources of income during the years under examination. During the years in question, the witness found total expenditures of about $63,600. (A. 8) He analyzed petitioner's expenditures, deductions, and exemptions as revealed by his investigation. (A. 8-9)

Petitioner offered to give him details concerning the funds accumulated prior to 1960, but only if he (petitioner) could receive judicial immunity. The witness conceded that sometimes people have and keep cash. Petitioner told the witness that the reason he did not file tax returns was that he was not working and had no gross income of more than $600 for each of the years. Petitioner told him the name of one bank where he had an account, and an approximate address of another bank, the name of which petitioner couldn't recall, where he formerly had an account. Petitioner was using his own and his wife's name (jointly) on these accounts; he was not secreting his identity with respect to the bank accounts. Petitioner told the witness that he owned some stocks in his wife's name, and that he had paid for a car in her name; that Mrs. Newman received child support from a former marriage, and this money was kept in bank accounts for the children, and was not used in deposits to petitioner's accounts; and that all deposits were made from cash on hand. (A. 9)

The witness did not include $100,000 per year as taxable to petitioner based upon Prigodich's alleged overhearing of petitioner's statement, because to do so would require more documentation than just petitioner's statement to a police officer. (A. 10)

Attorney Joseph A. Varon testified for petitioner that he represented petitioner in 1963 when petitioner was convicted and sentenced for a crime. It was not true that petitioner was financially unable to take further legal action on his case [as was stated in government's exhibit 73, the prison admission summary]. He appealed the case on petitioner's behalf, the Appellate Court's opinion [*Capitoli & Newman* v. *State*] being reported at 175 So.2d 210, and also filed a Petition for Rehearing, which was denied. On

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cross-examination, Mr. Varon testified that petitioner paid for his legal services. (A. 11)

Frances Newman testified that she was petitioner's mother. Petitioner's birthdate of 6/12/38, as shown on govt. exhibit 73 (the prison admission summary) is not correct. His correct birthdate is 6/12/39, as verified by petitioner's baptism paper. Contrary to the statement in govt. exhibit 73 that petitioner, born illegitimate, was adopted by the witness' husband when defendant was four, in fact defendant was the legitimate son of Arthur Wilson, to whom Mrs. Newman was married when petitioner was born. Petitioner was 11 or 12 when he was adopted by his stepfather, verified by court adoption papers. (A. 11).

Sam Newman testified that he adopted petitioner when petitioner was about 12 years old. He was married to petitioner's mother. During 1959 to 1964, the witness saw petitioner at the witness' home. (A. 11) During that time, petitioner left approximately 25 envelopes with the witness. He kept no records of the dates when petitioner left envelopes with him. He assumed the contents were money. Once he looked in an envelope at petitioner's request in 1964 and saw hundred dollar bills. He took $300 or $400 out to be sent by his wife to petitioner in prison. When petitioner came home from prison in 1966, he asked for the envelopes and Mr. Newman gave them to him. (A. 12)

REASONS FOR GRANTING THE WRIT

1.

The government did not establish a prima facie case under 26 U.S.C. 7201, tax evasion, as there was no evidence of any affirmative conduct by petitioner, an essential element of the charge. Further, the conviction cannot stand where the affirmative conduct necessary to sustain the charge purports to be false statements by petitioner to Treasury agents, since petitioner was not specifically charged with making false statements, so that upon such theory petitioner stands convicted of a charge other than that for which he was indicted, in violation of his substantive constitutional rights as defined in Stirone v. United States, 361 U.S. 212.

Petitioner was charged with having committed the offense of attempted evasion of taxes for the years in question by failing to make income tax returns and to pay taxes for those years and by "concealing and attempting to conceal . . . his true and correct taxable income" for those years, in violation of 26 U.S.C. 7201. (A. 1)

The evidence established only that defendant failed to file tax returns and to pay taxes for the years in question. There is no evidence that he attempted to conceal his assets from the appropriate officials; on the contrary, from the moment the investigation began, he cooperated with the I.R.S. by directing them to present and past bank accounts, which were kept under petitioner's and his wife's names jointly, and by telling the agent that certain property in his wife's name was purchased from funds supplied by petitioner. (A. 7-9) In none of the transactions evidenced

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by documents admitted by stipulation (A. 4) showing expenditures by petitioner had he made any attempts to conceal his true identity.

A. Two cases decided by this Court compel the conclusion that the trial court should have granted petitioner's motion for a judgment of acquittal. The conviction is contrary to the teachings of these cases, and certiorari should be granted to clarify their full implications.

Spies v. *United States,* 317 U.S. 492, involved the requirements for proving violation of then existing felony and misdemeanor tax statutes, substantially the same as the present sections, Title 26, United States Code, Secs. 7201 and 7203, respectively. The Court reversed because the trial court refused to instruct the jury that an affirmative act was necessary to support a felony conviction. (See requested instruction, 317 U.S. at 494). This Court stated:

> "The difference between the two offenses . . . is found in the affirmative action implied from the term 'attempt,' as used in the felony subsection. . . . The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended *some willful commission in addition to the willful omissions that make up the list of misdemeanors.* Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it *a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.*
>
> "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished. . . . Nor would we by definition con-

struct the scope of the congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think *affirmative willful attempt may be inferred from conduct* such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books and records, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind, and any *conduct* the likely effect of which would be to mislead or conceal." 317 U.S. at 498-99. (Emphasis added.)

In *Spies,* although there appeared to be evidence of such affirmative conduct, the Court reversed because this issue had not been properly submitted to the jury.

Sansone v. *United States,* 380 U.S. 343, involved the propriety of giving a lesser included offense instruction in a tax evasion case. The Court affirmed because, under the evidence as adduced at trial, there was no disputed issue of fact to justify the giving of a lesser included offense instruction. In reaching this conclusion, this Court again had occasion to analyze the differing elements of the felony and misdemeanor charges, this time under the present statutes:

> "As has been held by this Court, the elements of § 7201 [the felony statute] are willfulness; the existence of a tax deficiency . . . [citations omitted]; and *an affirmative act* constituting an evasion or attempted evasion of the tax . . . [citation omitted]. In comparison, § 7203 makes it a misdemeanor willfully to fail to perform a number of specified acts at the time required by law — the one here relevant being the failure to pay a tax when due. This misdemeanor requires only willfulness and the omission of the required act — here the payment of the tax when due. As recognized by this Court in Spies v. United States . . . the difference between a mere willful failure to

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> pay a tax (or perform other enumerated actions) when due under § 7203 and a willful attempt to evade or defeat taxes under § 7201 is that the latter felony involves 'some willful *commission* in addition to the willful omissions that make up the list of misdemeanors'." 380 U.S. at 351. (Emphasis added.)

In *Sansone* it was undisputed that defendant *had* filed a tax return, and that filing of a *false* tax return constituted a sufficient affirmative act to satisfy that requirement of Sec. 7201. The only factual issue was whether defendant's act was willful; if it was not, he was not guilty of violating either statute; therefore he was not entitled to a lesser included offense instruction.

No case was discovered wherein mere failure to file a tax return and to pay a tax was held sufficient to sustain a felony conviction under Sec. 7201.

Although *United States* v. *Schipani,* 362 F.2d 825 (2 Cir. 1966) (cert. granted on wiretapping issue only, 385 U.S. 825, aff'd after retrial, 414 F.2d 1262 (2 Cir. 1969)), may appear so to hold, a careful reading of the original opinion (362 F.2d 825) reveals affirmative acts in addition to the mere failure to file, namely, "evidence of Schipani's apparent attempts to conceal income . . . through use of assumed names and other devices . . . " 362 F.2d at 831. There is no such evidence in the case at bar; on the contrary, as previously noted, petitioner consistently used his correct name in all transactions, and utilized no other devices in any attempt to conceal his assets or income.

In *United States* v. *Penosi,* 452 F.2d 217 (5 Cir. 1971), although the court affirmed felony convictions without discussing the presence or absence of evidence to substantiate the felony statute's requirement of attempts to conceal income, the Brief filed by the government in that case

indicates that Penosi actively sought to conceal his income by consistently understating his income and by not having any bank accounts. Gov't Brief, *United States* v. *Penosi*, No. 31,151, p. 12. In the case at bar, however, petitioner never understated his income, but consistently maintained that his expenditures were made from cash on hand prior to 1960, and maintained bank accounts in his own name and jointly with his wife, cooperating with IRS agents in disclosing these bank accounts.

In those cases where convictions have been affirmed, there was sufficient evidence of affirmative conduct such as that described in *Spies, supra.* Where such evidence is absent, the courts reverse. Even the Fifth Circuit has previously so held. See, *e.g., Clay* v. *United States,* 218 F.2d 483, 485-86 (5 Cir. 1955); *Jones* v. *United States,* 164 F.2d 398 (5 Cir. 1947); *Wardlaw* v. *United States,* 203 F.2d 884, 886 & 886 n. 3 (5 Cir. 1953); *Reynolds* v. *United States,* 288 F.2d 78 (5 Cir. 1961); *United States* v. *Stone,* 431 F.2d 1286, 1288 (5 Cir. 1970).

In *United States* v. *Stone, supra,* the court affirmed because there was sufficient proof of acts of commission. The court held:

> "In the prosecution of a § 7201 violation the Government establishes a prima facie case by showing a deficiency in the defendant's tax return plus a willful, affirmative act by the accused constituting an evasion or attempted evasion of the tax owed." *Id.* at 1288.

The affirmative acts in *Stone* which justified affirming his conviction were:

> "a persistent pattern of under-reporting large amounts of income, a failure to enter all his income in his books and records, a deliberate destruction of his books and records, and his habit of personally cash-

> ing patient's checks and depositing the cash rather than the checks, which allowed him to avoid entry of those payments in his books." *Ibid.*

No such conduct by petitioner was shown in the instant case. All the government showed was failure to file returns and to pay tax for the years in question.

A number of cases from other Circuits, following the teachings of *Spies* and *Sansone*, *supra*, have reiterated the distinction between the felony and the misdemeanor as being the requirement of affirmative conduct, as opposed to mere omissions, to support a conviction for the felony, affirming only where the evidence establishes affirmative conduct. See, *e.g.*, *United States* v. *Masheski*, 286 F.2d 345, 346 (7 Cir. 1961); *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 (2 Cir. 1972); *Gariepy* v. *United States*, 220 F.2d 252, 257-58 (6 Cir. 1955); *Elwart* v. *United States*, 321 F.2d 928, 935-36 (9 Cir. 1956); *Kirsch* v. *United States*, 174 F.2d 595 (8 Cir. 1949); *United States* v. *Smith*, 206 F.2d 905 (3 Cir. 1953); *United States* v. *Coppola*, 425 F.2d 660 (2 Cir. 1969); *United States* v. *Kafes*, 214 F.2d 887, 890 (3 Cir. 1954); *United States* v. *Cave*, 159 F.2d 464, 466-67 (8 Cir. 1947); *United States* v. *Vitiello*, 363 F.2d 240, 243 (3 Cir. 1966).

The Fifth Circuit's ruling on this issue in the case at bar constitutes a substantial departure from foregoing case law, since there was no evidence of affirmative conduct by petitioner. Certiorari should be granted to make clear this Court's previously stated position concerning the requirement of proof of affirmative conduct to support the felony conviction.

B. The Court of Appeals rejected petitioner's contention that there was no evidence of affirmative conduct,

adopting the government's theory (Gov't Br., pp. 7-8) that "false statements" to IRS agents constituted sufficient affirmative conduct to justify conviction under Sec. 7201. See App. A, p. 5, where the Fifth Circuit stated:

> "Although defendant did not file any false *returns*, there is ample proof of *statements* made by defendant to Treasury agents denying any income during the years in question. The government's evidence, accepted by the jury, established that these statements were false." (Emphasis in original.)

The court relied upon *United States* v. *Beacon Brass Co.*, 344 U.S. 43, to support its conclusion that false statements constitute sufficient "affirmative conduct" to sustain a felony conviction for attempt to evade taxes.

Beacon Brass was misapplied. That case dealt with the validity of an indictment under the predecessor of Sec. 7201 (Title 26, United States Code, Sec. 145(b)), alleging that defendant evaded taxes by making false statements to treasury representatives on a date certain. Defendant there contended that since a specific statute (18 U.S.C. 1001), prohibited the making of false statements to United States representatives, such conduct could not also be made criminal by the tax evasion statute. This Court reversed the order dismissing the indictment, holding that making false statements to Treasury agents could be encompassed by the felony tax evasion statute.

In *Beacon Brass, supra,* the indictment *specifically* charged defendant with having evaded taxes by making such false statements, whereas in the case at bar petitioner was not so charged. The Fifth Circuit's affirmance of petitioner's conviction upon the "false statement" theory amounts to upholding his conviction for a charge other

than that for which he was indicted. Accepting this theory results in petitioner standing convicted of a wholly different offense than that charged by the grand jury, in violation of petitioner's substantive constitutional rights. *Stirone* v. *United States,* 361 U.S. 212, 216-19. See also *United States* v. *Roach,* 321 F.2d 1 (3 Cir. 1963); *Street* v. *New York,* 394 U.S. 576, 585-86; *United States* v. *Tomasetta,* 429 F.2d 978 (1 Cir. 1970).

The Fifth Circuit's logic portends a dangerous tautology: one who commits the misdemeanor (Sec. 7203) of failing to file income tax returns after having denied taxable income is automatically also guilty of the felony of attempt to evade income tax (Sec. 7201) solely because the jury disbelieved him and found that he had taxable income, *i.e.,* that such denial was "false."

It could not have been envisioned or intended by Congress that one found guilty of the misdemeanor is automatically guilty of the felony as well merely because the jury, by its guilty verdict, disbelieved the defendant's denial of taxable income.

United States v. *Beacon Brass Co., supra,* does not compel this extraordinary result, nor does it support the Circuit Court's position. On the contrary, under the facts here presented, *Stirone* v. *United States, supra,* forbids it.

Certiorari should be granted to make clear that one may not properly be convicted of an offense not charged by the grand jury, *Stirone* v. *United States,* 361 U.S. 212, 216-19, and to nip in the bud the dangerous concept that one who is found guilty of the misdemeanor after denying taxable income is thereby also guilty of the felony.

2.

The government failed to present a prima facie case against petitioner, since evidence adduced by the government as part of its case in chief negated an essential element of the tax evasion charge.

Petitioner was convicted of violating 26 U.S.C. 7201, willful attempt to evade income tax liability for the years 1968, 1969, and 1970. The government apparently convinced the jury and the Fifth Circuit that, while in a bar in October, 1968, petitioner bragged to several policemen *that he made $100,000 a year "tax free."* Although the government did not attempt to make this supposed income a basis for tax liability (it charged that petitioner had taxable income in 1968 of $9,235.74 and a tax liability of $1,775.75) (A. 1), and although government witness, tax agent Childress testified that he did not include the purported $100,000 a year as taxable to petitioner based on Lt. Prigodich's overhearing of petitioner's barroom braggadoccio because to do so would require more documentation than just petitioner's statement to a police officer (A. 10), the Fifth Circuit considered such alleged statement against interest as one of the main factors supportive of the sufficiency of evidence to meet the government's burden. (App. A., p. 6)

But at the very least, if Prigodich's sudden remembrance in 1972 that defendant bragged in a bar in 1968 that he made $100,000 a year "tax free" is to be considered at all, and if the government asserts such as proof of income, then *the government itself has provided proof of defendant's source of income in years prior to 1969 and 1970 more than covering the expenditures in those years,* and therefore the conviction as to counts 3 and 4 charging that

petitioner had a taxable income of $21,000 in 1969 and $15,000 in 1970 (A. 1) should be reversed.

May the government have its witness state that in 1968 petitioner said, "I make $100,000 a year, tax free," present it as proof to the jury, vouch for the witness' credibility by presenting his testimony, impress the Fifth Circuit to rely on that statement (App. A, pp. 3 and 6) and then deny its application to petitioner's benefit? That would be illogical, aside from being prejudicially unfair.

Permitting such use of petitioner's alleged statement only to his detriment results in denying his right to a fair trial. For even though the conviction on one felony count might support the two and one-half year sentence with which petitioner is now faced, there remains the realistic possibility — considering that the jury found petitioner not guilty as to Counts 1 and 5 — that if the counts as to the years 1969 and 1970 — Counts 3, 4, 7 and 8 — had not been submitted to the jury, petitioner might have been found not guilty as to the one remaining felony count (Count 2) charging a violation for the year 1968.

Also, it is entirely feasible to consider that the trial judge may not have imposed such a severe sentence for the one count of 1968 if that were petitioner's only conviction. For similar offenses on pleas of guilty by other reputed thieves who failed to file returns, the same court imposed sentences of six months incarceration.*

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* *United States* v. *Campagna*, No. 71-262-Cr. and *United States* v. *Katz*, No. 71-264-Cr., in which each defendant pled guilty to one count of a multiple count tax indictment, based upon governmental allegations similar to those in the case at bar. Each defendant was sentenced to six months' incarceration upon his plea of guilty to one count.

Thus, it is clear that petitioner may have been irrevocably injured by permitting the Prigodich testimony to be used only to petitioner's detriment.

Moreover, petitioner's statement that he made $100,000 "a year," even defeats the government's case as to 1968 as well. If petitioner made $100,000 "*a year,*" we must assume that 1967 was also one such year, particularly since the statement was allegedly made before 1968 was over. Thus, carried to its logical conclusion, Prigodich's testimony invalidates each of petitioner's felony convictions (Counts 2, 3, and 4, for 1968, 1969, and 1970, respectively).

Because the government proof negates the existence of taxable income for the years in question, no prima facie case was made against petitioner. Certiorari should be granted to prevent such unfair and prejudicial, one-sided use of government evidence, and to definitively restate the standards for a prima facie case.

3.

Petitioner's conviction may not stand where the government failed to prove a likely source of taxable income for the prosecution years. Certiorari should be granted to clarify this Court's holding in United States v. Massei, 355 U.S. 595, as applied to petitioner.

As previously noted, the government proceeded by way of the so-called "expenditures" method of proof, which is but a variant of the frequently used "net worth" method. The net worth method has been approved by this Court as a method of proof in certain tax cases. *Holland* v. *United States,* 348 U.S. 121. At the same time, however, the Court recognized that this method of proof could be dangerous

to an innocent defendant, stressing that its use must be carefully scrutinized by the judiciary. *Id.* at 129.

When utilizing the "expenditures" method of proof, the government must show: (1) opening available funds at the beginning of each prosecution year; (2) available funds acquired during the year; (3) expenditures for the prosecution year in excess of (1) plus (2); and (4) the government must exclude non-taxable sources of available funds by affirmative evidence. *Dupree* v. *United States,* 218 F.2d 781, 784 (5 Cir. 1955); see *Taglianetti* v. *United States,* 398 F.2d 558, 562-66 (1 Cir. 1968).

In the case at bar, the government failed sufficiently to negate possible sources of non-taxable funds from which petitioner's admitted expenditures had been made during the prosecution years, and failed to prove either an actual or even a likely source of taxable income for those years. Moreover, although petitioner told the investigating agents, and maintained at trial, that the funds from which the expenditures were made came from cash accumulated during his career as a thief prior to 1960, he was unable further to substantiate this without incriminating himself. (This latter aspect of the case will be fully discussed as Point 4 of this Petition p. 24, *infra.*)

The government normally has a burden to show at least a likely source of taxable income to account for expenditures shown to have been made during a prosecution year, and to negative possible non-taxable sources for such expenditures. This Court has held that under the net worth method of proof, while proof of a likely source of taxable income is sufficient to sustain a conviction, it is not necessary in every case. *United States* v. *Massei,* 355 U.S. 595. However, the Court did not specify in what types of cases

it would *not* be necessary, and the subsequent case law indicates that both proof of a taxable source and negation of non-taxable sources of income for the prosecution years *is* necessary. See *United States* v. *Balistrieri*, 403 F.2d 472, 480-81 (7 Cir. 1968); *United States* v. *Dawson*, 400 F.2d 194, 201 (2 Cir. 1968).

In the instant case, no likely source of taxable income for the prosecution years was established, and nothing negated petitioner's theory that the expenditures came from a pre-1960 cash hoard, concerning which petitioner presented substantially unrefuted testimony. The Prigodich testimony cannot seriously be considered as proof of a nontaxable source. The document purporting to refute the cash hoard theory, govt. exhibit 73 (the prison admission summary) should not have been admitted over objection (see Point 5 of this Petition, *infra*, p. 27); and in any event, petitioner demonstrated on cross-examination and by direct testimony, that much of the information contained in this document was patently erroneous. (A. 6-7; 11-12)

The government did show that IRS agents conducted an investigation attempting to negate sources of non-taxable income. (A. 7) However, there is no evidence that the government took any steps in an attempt to negate petitioner's cash hoard theory, that is, to negate that expenditures were made from funds existing prior to the prosecution years. And to require petitioner to supply particulars as to the accumulation of those funds without granting him immunity (see A. 9) in order to avoid tax liability and criminal liability regarding tax due amounts to requiring him to incriminate himself in violation of the Fifth Amendment. (See point 4 of this Petition, *infra*.)

Although it has been held that a defendant advancing a cash hoard theory has a burden to assist the government, the government has a concomitant duty to attempt to verify this theory. *Hayes* v. *United States,* 407 F.2d 189, 193 (5 Cir. 1969); *United States* v. *Hom Ming Dong,* 436 F.2d 1237 (9 Cir. 1971); *Agoranos* v. *United States,* 409 F.2d 333 (5 Cir. 1969). And imposing such a burden on petitioner in the circumstances of the case at bar amounts to violation of his privilege against self-incrimination. (See point 4 of this Petition, *infra.)*

Because the government did not sufficiently negate possible tax-exempt sources — such as a pre-existing cash hoard — from which the expenditures were made, and because it did not show *any* possible source of taxable income for the prosecution years,* petitioner's convictions must be overturned. Certiorari should be granted to clarify this Court's holding in *United States* v. *Massei,* 355 U.S. 595.

* Although the government argued below that the Prigodich testimony served to prove that petitioner was still pursuing his career as a thief, (see Gov't Br. p. 9), surely it cannot seriously be considered as establishing a likely source of taxable income within the meaning of prevailing case law.

4.

Petitioner's Fifth Amendment rights were violated by application of the expenditures-net worth method of proof under the circumstances of this case, where petitioner maintained that his expenditures were made from a previously accumulated cash hoard from his prior career as a thief. Further, the Fifth Circuit's approach to such method of proof involves the use of an unconstitutional presumption and unconstitutionally shifts the burden of proof to petitioner, in violation of his rights to due process of law. Certiorari should be granted to determine whether such method of proof as applied by the Fifth Circuit may be permitted in the light of such prior decisions of this Court as Leary v. United States, 395 U.S. 6, Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62, and Haynes v. United States, 390 U.S. 85.

In a dangerous erosion of Fifth Amendment privileges, the Fifth Circuit held that to defeat the governmental assertions here — that is, to avoid being held criminally accountable for taxable income equivalent to expenditures — petitioner must give up his Fifth Amendment privilege of silence and convict himself of thefts which he admittedly committed by providing the time and place, the victims, and the amounts taken. In other words, the expenditures are presumed to come from taxable income unless petitioner were to come forth with the details of how he accumulated his pre-existing cash hoard. Thus, to avail himself of his constitutional right to the presumption of innocence, petitioner is being told he must first waive his Fifth Amendment rights.

Such a concept is in conflict with decisions of this Court which state that a citizen must not be compelled to waive his rights under one section of the Constitution in order

to assert his privilege under another. See *Simmons* v. *United States*, 390 U.S. 377, 393-94, where this Court stated, " . . . we find it intolerable that one constitutional right should have to be surrendered in order to assert another."

In *United States* v. *Penosi*, 452 F.2d 217 (5 Cir. 1971), 452 F.2d 217 (5 Cir. 1971), the Fifth Circuit found the proof sufficient where the government established defendant's opening net worth as consisting of one mortgaged car, where an extensive investigation for possible sources of non-taxable income revealed none, and where expenditures were established. This holding apparently means, in its factual context, that where a defendant does not supply "relevant leads" (*id.* at 220) concerning possible non-taxable sources of his expenditures, all the government need show to establish the existence of taxable income and tax due for each prosecution year is: (1) an opening net worth, (2) expenditures, and (3) that a reasonably thorough investigation revealed no non-taxable sources for the expenditures. That is, at best, all that was shown in the case at bar.

However, we urge that where, as here, petitioner maintains that the expenditures were made from funds accumulated from illegal sources prior to the prosecution years, requiring him to choose between revealing the details of those illegal activities so as to subject himself to prosecution therefor with no offer of immunity (see A. 9), or remaining silent, subjecting himself to civil and criminal tax liability, amounts to a clear violation of his Fifth Amendment privilege against self-incrimination. Moreover, this approach to the method of proof unconstitutionally shifts the burden of proof to petitioner.

What the Fifth Circuit's holding in *Penosi, supra,* and in the case at bar, really amounts to is this: where a de-

fendant fails fully to cooperate with the IRS, and expenditures are established, negation by the government of possible non-taxable sources through a reasonable investigation is equivalent to proving the existence of taxable income. This constitutes a presumption of taxable income unless the defendant himself rebuts the presumption, and is indeed a judicial, rather than a statutory, presumption. And since the existence of taxable income is an element of the offense, the Fifth Circuit's approach amounts to proving an element of the offense by a judicial presumption in the absence of a satisfactory explanation by a defendant.

This presumption is unconstitutional, since there is no rational relationship between the fact proved — that is, the negative fact of no proven source of non-taxable income — and the fact presumed — that is, the existence of a taxable source. *Leary* v. *United States,* 395 U.S. 6, 33-36.

Even if such judicial presumption is not deemed unconstitutional on the grounds that there is no rational relationship between the presumed fact and the proven fact, still as applied to petitioner it is unconstitutional as a violation of his privilege against self-incrimination. Requiring him to incriminate himself by coming forward with particulars concerning his cash hoard violates his Fifth Amendment privilege. The judicial presumption noted above does indeed require him so to do in order to avoid criminal tax liability for the prosecution years, and this is constitutionally impermissible. Moreover, it also operates to unconstitutionally shift the burden of proof to petitioner. For these reasons, petitioner's convictions ought not stand. *Leary* v. *United States,* 395 U.S. 6, 27-28; *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; *Haynes* v. *United States,* 390 U.S. 86.

Even if the presumption utilized by the Fifth Circuit is deemed proper as against the attacks that it is irrational

and that it unconstitutionally shifts the burden of proof, still we urge that its application to petitioner must be condemned on Fifth Amendment grounds, where he had been convicted of theft (A. 5, 8), had stated that he made the expenditures from illegally gotten cash accumulated prior to the prosecution years (A. 8), and no immunity was forthcoming to protect him from prosecution if he did substantiate his claimed cash hoard. (A. 9)

Certiorari should be granted to determine whether the net worth-expenditures method of proof as applied by the Fifth Circuit to petitioner may be permitted in the light of prior Supreme Court decisions such as *Leary* v. *United States, Marchetti* v. *United States, Grosso* v. *United States,* and *Haynes* v. *United States, supra.*

5.

Petitioner's right to a fair trial in accordance with due process of law was violated when the court permitted the jury to consider government's Exhibit 73, a prison admission summary, and testimony pertaining thereto, and denied petitioner's motions to strike or for a mistrial, since the document contained inadmissible and incompetent hearsay relative to petitioner's net worth at the beginning of the first indictment year.

Under the expenditures net worth method of proof, it is essential that the government establish the defendant's net worth at the beginning of the first indictment year. *Holland* v. *United States,* 348 U.S. 121; *Dupree* v. *United States,* 218 F.2d 781, 784 (5 Cir. 1955). Petitioner was admitted to prison in 1965 and released in October, 1966. To establish petitioner's opening net worth, the government asserted that when petitioner was interviewed in prison upon his admission there in 1965, he claimed no

assets. There was introduced government Exhibit 73, petitioner's prison admission summary, as proof that petitioner's net worth was zero because of statements contained therein that petitioner had abandoned the appeal of his criminal case for lack of funds, and that he expected to get money from his parents for his commissary needs.

The government witness, LeTendre, who identified and gave testimony concerning this document, admitted that he had not personally received this information from petitioner. (A. 6) Indeed, he could not state who had received it. (A. 6) Moreover, the information was taken by an unidentified person or persons, and could even have been taken and recorded by another inmate. (A. 6) Thus the document was not competent evidence. Even under the most liberal rule favoring admissibility of business records, the item in question does not qualify, since the taker of the information was not identified as a subordinate of LeTendre. LeTendre also testified that some inmates are "shy" about revealing their monetary status and do not always reveal their assets to the interviewer (A. 7), casting even graver doubts upon the contents of the document.

Also, it was demonstrably shown that a good many specific assertions in the prison admission summary were false. (A. 11-12) The most important of the erroneous statements in the summary was that petitioner had abandoned an appeal of his conviction for which he went to prison in 1965 because he could not afford the appeal. Attorney Joseph Varon testified that he represented petitioner in 1963 when petitioner was convicted and sentenced, and it was not true that petitioner was financially unable to take further legal action on his case, because, in fact, the case was appealed and was reported, *Capitoli (and Newman)* v. *Florida,* 175 So.2d 210; and further, that he filed

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a petition for rehearing on Newman's behalf. (A. 11) He further testified that petitioner paid him for his services. (A. 11) The statement in the prison admission summary that petitioner was "financially unable" to take further legal action (A. 5), thus was patently shown to be false. By submitting this document containing such false information, the government in effect asked the jury to consider evidence shown to be false by other evidence — that is, by the reported decision of petitioner's state appeal — of which a court must take judicial notice. And by permitting the document to be admitted in evidence, and denying petitioner's motions to strike or for a mistrial (A. 7), the court gave the jury full authority to consider the incompetent, prejudicial material, and thus deprived petitioner of his due process right to a fair trial.

Because the witness LeTendre did not take the information in question from petitioner and could not testify who had, it should have been excluded upon defense objection. *Yaich* v. *United States,* 283 F.2d 613, 616 (9 Cir. 1960); *Olender* v. *United States,* 210 F.2d 795, 801, 804-05 (9 Cir. 1954).

For the jury to be permitted to consider this incompetent evidence was irremediably harmful to petitioner, since it formed the basis for the opening net worth figure, and tended to negate his cash hoard theory. Even though it is wholly understandable why he may have made such a statement, though false, when entering prison (see A. 7), the document was not competent proof thereof; and yet the jury was permitted to consider it. Since petitioner's opening net worth and the existence or non-existence of a cash hoard were crucial jury questions on the issue of petitioner's guilt or innocence, the jury's consideration of this incompetent, hearsay statement allegedly made by peti-

tioner which established his opening net worth as zero and tended to refute his theory of the case, constitutes reversible error.

The Fifth Circuit's opinion ignores the *Yaich* and *Olender* decisions, *supra,* which had been called to the court's attention by petitioner. Instead, the court relied upon several other cases which are not in point, or which do not support the Fifth Circuit's position. In *Tomlin* v. *Beto,* 377 F.2d 276 (5 Cir. 1967), the issue was whether a *certified* copy of a conviction record in the prison files, sent to the prison by the clerk of the court, was valid evidence to show that defendant had previously been convicted. Certainly, no such authority for the assertions in government's Exhibit 73 was claimed in the case at bar, and thus the case is inapropos. In *United States* v. *Martin,* 434 F.2d 275, 279 (5 Cir. 1970), the court upheld exclusion from evidence of a Chicago Police Department report presented by an FBI agent. The report was not prepared by the identifying witness or his subordinate. The rationale of this case supports petitioner's position that the prison admission summary should have been excluded. For the government witness LeTendre stated that the material regarding petitioner's financial inability to pursue legal action (which was demonstrably shown to be false) was not prepared by him through interview with petitioner; LeTendre could not state who received the information, and it even could have been another inmate. And in the third case cited by the Fifth Circuit, *United States* v. *Middlebrooks,* 431 F.2d 299, 302 (5 Cir. 1970), exclusion of a document was upheld, where the issue was whether the question of intent was or was not close.

If in fact any or all of the cases relied upon by the Fifth Circuit do in fact support its decision on this issue,

then there is a conflict between the Fifth and Ninth Circuits, in that the above cases as so interpreted conflict with the Ninth Circuit's decisions in *Yaich* and *Olender, supra.*

Since this incompetent, inaccurate document formed the basis for petitioner's opening net worth figure, and tended to refute his theory of the case, its admission was clearly prejudicial to petitioner. Petitioner's right to a fair trial was violated by the court's rulings concerning this document. Certiorari should be granted to clarify the requirements for admissibility of so-called business records in criminal cases where the identifying witness or his subordinate did not receive the information in question, and to resolve an apparent conflict on this issue between the Fifth and Ninth Circuits.

Conclusion

For the above and foregoing reasons, we respectfully urge the Court to grant this Petition for Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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